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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

IN THE MATTER OF THE SEARCH OF A	)	Case No. 4-19-70053 KAW
RESIDENCE IN OAKLAND, CALIFORNIA	)	
	)	UNITED STATES' SUPPLEMENTAL BRIEF
	)	REGARDING MOOTNESS
	)	
	)	Date: April 17, 2019
	)	Time: 10:30 a.m.
	)	Duty Judge: The Honorable James Donato
	)	
	)	
	)	

At this Court's April 17, 2019, hearing on the United States' request for review of the duty Magistrate Judge's order regarding the search warrant application in this matter, the Court requested supplemental briefing about the appropriate remedies if the review is deemed moot. The United States respectfully submits the Court has power to vacate the order if even the matter is moot.

**A. This matter is not moot**

First, the United States reiterates its position that the matter is not moot. *See* ECF No. 2 at 4–5 (explaining why this matter is not moot). The dispute here “is capable of repetition, yet evading review.” *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). “A dispute is capable of repetition if ‘there [is] a reasonable expectation that the same complaining party would be subjected to the same action again’; it is likely to evade review if ‘the challenged action was in its duration too short to be fully

1 litigated prior to its cessation or expiration.” *Unabom Trial Media Coalition v. U.S. Dist. Court for*  
 2 *Eastern Dist. of California (Sacramento)*, 183 F.3d 949, 950 (9th Cir. 1999) (alteration in original)  
 3 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)).

4 Put another way, this exception to mootness “applies where (1) the challenged action is in its  
 5 duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable  
 6 expectation that the same complaining party will be subject to the same action again.” *Davis v. FEC*,  
 7 554 U.S. 724, 735 (2008) (internal quotations omitted); *Weinstein v. Bradford*, 423 U.S. 147, 149  
 8 (1975).

9 Here, the government can expect to be subjected to the same action in the future because  
 10 Magistrate Judge Westmore has made clear she will not sign future search warrants that authorize the  
 11 government to unlock electronic devices using biometrics. And the time-sensitive nature of search  
 12 warrant applications means that the government may be hard pressed to fully litigate such denials in the  
 13 future. *See Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 63 (4th Cir. 1989) (where newspaper challenged  
 14 sealing order, rejecting government’s argument that case was moot, because “there is a reasonable  
 15 expectation that the Sun will be subject to another sealing order denying it access to an affidavit,” and  
 16 “[w]e are convinced that this kind of secrecy order is usually too short in duration to be litigated fully,”  
 17 where “[t]he affidavit was unsealed within eight months after the Sun filed its petition”); *see also Globe*  
 18 *Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) (“The controversy between the parties in  
 19 this case is indeed ‘capable of repetition, yet evading review.’ It can reasonably be assumed that Globe,  
 20 as the publisher of a newspaper serving the Boston metropolitan area, will someday be subjected to  
 21 another order relying on [Massachusetts General Laws] § 16A’s mandatory closure rule [excluding press  
 22 and general public from courtroom during testimony of minor victims of specified sexual offenses].  
 23 And because criminal trials are typically of ‘short duration,’ such an order will likely ‘evade review, or  
 24 at least considered plenary review in this Court.” (citations omitted)); *Press-Enterprise Co. v. Superior*  
 25 *Court*, 478 U.S. 1, 6 (1986) (same reasoning); *Gannett Co. v. DePasquale*, 443 U.S. 368, 377–78 (1979)  
 26 (same); *Unabom Trial Media Coalition*, 183 F.3d at 951 (noting that “[p]ost-trial release of previously  
 27 sealed transcripts does not necessarily render a case moot” and that “the ‘capable of repetition, yet  
 28 evading review’ exception applied” in those prior cases “because the press was reasonably likely to face

1 similarly short-lived closure orders in the future” (citing *Phoenix Newspapers, Inc. v. U.S. Dist. Court*,  
 2 156 F.3d 940, 946 (9th Cir. 1998); *United States v. Brooklier*, 685 F.2d 1162, 1165 (9th Cir. 1982)).<sup>1</sup>

3 **B. Even if the case is moot, the Court has authority to vacate the magistrate’s order**

4 Even if this case is moot, however, the Court has inherent authority to vacate its own order.  
 5 And to be clear, the magistrate’s order *is* this Court’s order. The magistrate is appointed by the Court,  
 6 28 U.S.C. § 631(a), and operates under a delegation of the Court’s authority, 28 U.S.C. § 636, and  
 7 subject to this Court’s supervision. “Under [28 U.S.C.] § 636(b)(1)(B) the ‘authority and the  
 8 responsibility to make an informed, final determination rests with the judge. . . . The delegation of  
 9 duties to the magistrate does not violate Article III if the ultimate decision is made by the district  
 10 court.’” *Hunt v. Pliler*, 384 F.3d 1118, 1124 (9th Cir. 2004) (ellipsis in original) (quoting *Britt v. Simi*  
 11 *Valley Unified Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983)); *see also Gomez v. United States*, 490 U.S.  
 12 858, 867–68 (1989). The Ninth Circuit “has emphasized that ‘the district court must actually exercise its  
 13 discretion, rather than summarily accepting or denying’ the magistrate judge’s findings.” *Hunt*, 384  
 14 F.3d at 1124 (quoting *United States v. Howell*, 231 F.3d 615, 622 (9th Cir. 2000)).

15 Courts have inherent authority to vacate their own orders even if the matter has become moot.  
 16 *See U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 29 (1994) (appellate court should  
 17 vacate lower court’s judgment only under “exceptional circumstances,” but district court may vacate its  
 18 own judgment if equitable to do so); *In re: TFT-LCD (Flat Panel) Antitrust Litig.*, 07-M-1827 SI, 2012  
 19 WL 12369590, at \*3 (N.D. Cal. Oct. 15, 2012) (Illston, J.) (“[U]nder Ninth Circuit and Supreme Court  
 20 precedent, ‘a district court may vacate its own [moot] decision in the absence of extraordinary  
 21 circumstances.’” (quoting *American Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1168 (9th Cir.  
 22 1998))); *see also Dilley v. Gunn*, 64 F.3d 1365, 1370–71 (9th Cir. 1995) (“[W]hen an appellant renders  
 23 his appeal moot by [settlement] . . . the district court can decide whether to vacate its judgment in light  
 24 of ‘the consequences and attendant hardships of dismissal or refusal to dismiss’ and ‘the competing  
 25  
 26

27 <sup>1</sup> The Supreme Court’s recent decision in *United States v. Microsoft*, 138 S. Ct. 1186, 1188  
 28 (2018), is not to the contrary. There, the mootness was caused by an underlying change in the statutory  
 law (the Cloud Act), and thus it could not be said that denial of warrants issued under the statute before  
 the enactment were capable of repetition yet evading review. *Id.*

values of finality of judgment and right to relitigation of unreviewed disputes.’” (quoting *Ringsby Truck Lines, Inc. v. W. Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982))).

Appellate courts also have authority—albeit somewhat narrower authority—to vacate lower courts’ orders even if the case has become moot. See *Alvarez v. Smith*, 558 U.S. 87, 94 (2009) (“The statute that enables us to vacate a lower court judgment when a case becomes moot is flexible,” and “we normally do vacate the lower court judgment in a moot case because doing so ‘clears the path for future relitigation of the issues between the parties’ . . . .” (citing 28 U.S.C. § 2106)); *Robinson v. Pfizer, Inc.*, 855 F.3d 893, 898 (8th Cir. 2017); *Reiter v. Universal Marion Corp.*, 273 F.2d 820, 825 (D.C. Cir. 1960) (“In dismissing a case as moot, an appellate court may vacate the orders or judgments below in order to avoid prejudice to a party.”).

“*U.S. Bancorp* makes clear that the touchstone of vacatur is equity.” *Dilley*, 64 F.3d at 1370. Here, vacatur is the appropriate remedy. The magistrate’s decision – issued without briefing or argument – is wrong and has the potential to sow confusion throughout this District and others. Agents and prosecutors with time sensitive investigations may decide to forego lawful investigative techniques rather than lose valuable time in an appeal. While the government’s decision here to submit a new warrant application brought with it questions about mootness, it bears emphasis this decision was borne of concerns that publicity around the order would cause the suspects to impede the investigation. Notably, no litigant will be harmed by vacatur.

For these reasons, whether or not the matter is moot, the Court has power to and should vacate the Magistrate’s order.

Dated: May 1, 2019

Respectfully submitted,

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/s/

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